Nos. 90-1205, 90-6588

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JAKE AYERS, SR., ET AL.,

Petitioners,

vs.

RAY MABUS, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

vs.

RAY MABUS, ET AL.,

Respondents.

Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The private petitioners' question concerning the scope of the legal duty to disestablish should be more precisely stated under the court of appeals opinion as follows:

> Whether the State's affirmative duty to disestablish its prior system of de jure segregation in higher education extends beyond discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures which afford all students real freedom of choice to attend the college or university they desire.

2. The United States presents a single purported legal question concerning a state's obligation to dismantle a racially dual system. The question is predicated, however, upon an erroneous presumed fact of alleged continuing state interference with choice by race. The court of appeals did not hold respondents interfere with choice by race; it affirmed the district court and found "real freedom of choice" exists. The United States' question is a question of fact which should be stated as follows:

> Whether the district court's finding that the continued racial identifiability of Mississippi universities persists today as the result of free and unfettered choice of students and personnel and despite the State's substantial affirmative good-faith efforts in "other-race" recruitment and resource allocation is clearly erroneous.

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BRIEF IN OPPOSITION

The State of Mississippi respondents[1] submit this consolidated response in opposition to the petitions for a

[1] Respondents are the Governor, the Commissioner of Higher Education, the Board of Trustees of State Institutions of

(Continued on following page)

writ of certiorari separately filed by the class of black citizens and the United States.

STATEMENT OF THE CASE

The State of Mississippi admittedly maintained a segregated system of higher education through at least 1962. Court action was necessary to assure admission of the first black student into a formerly all-white public institution of higher learning. From that point forward, however, the petitioners' statements of the case require supplementation and in some instances correction. While predominantly black and, to a lesser extent, predominantly white universities do remain, the record, district court opinion and court of appeals opinion preclude any notion of mechanical equation of Mississippi's system today with its distant unconstitutional past.

The district court conducted a five-week bench trial in April and May 1987. The proof addressed virtually all facets of public higher education, from governance, student recruitment, student admission, faculty and staff employment practices to institutional mission designations, program distribution, facilities and funding practices. The district court weighed the testimony of 71 witnesses and received some 56,700 pages of exhibits.

(Continued from previous page)

Higher Learning, the individual members of the Board of Trustees, Delta State University, Mississippi State University, Mississippi University for Women, the University of Mississippi, the University of Southern Mississippi, and the chief administrative officer of each of these five universities.

(App. 109a)[2] The district court entered comprehensive detailed findings in reaching its factual conclusions that respondents have not merely "adopted race-neutral policies and procedures in the areas of student admission and recruitment and in the areas of faculty and staff hiring and resource allocation"; respondents have "also undertaken substantial affirmative efforts in the areas of other-race student and faculty-staff recruitment and funding and facility allocation." (App. 201a) Respondents incorporate by reference the district court's factual findings dispersed throughout its opinion, for these findings accurately relate the facts material to the questions presented in the petitions.

The court of appeals plainly stated at the outset of its opinion the ultimate basis for its affirmance: "Finding that the *record makes clear* that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that *all students have real freedom of choice* to attend the college or university they wish, we affirm." (App. 2a) (emphasis added). Like the district court, the court of appeals acknowledged that "Mississippi was . . . constitutionally required to eliminate invidious racial distinctions and dismantle its dual system." (App. 13a) Similar to the district court, the appellate court emphasized, however, that "universities are not simply institutions for advanced education. They

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[2] Citations to the lower court opinions will be referenced to the appendices following the United States' petition in which the opinions have been reproduced. Designations will be "App. [page]."

differ in character fundamentally from primary and secondary schools." (App. 23a) The court concluded that delineation of the duty to disestablish must necessarily honor the distinctive attributes of higher education, particularly freedom of choice and institutional diversity. (App. 23a-26a) The appellate court read *Bazemore*,[3] in conjunction with *ASTA*,[4] to be the proper assessment of this " 'wholly different milieu' of a voluntary association." (App. 25a) Thus, the court of appeals held that the state satisfies its affirmative duty to disestablish "by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures." (App. 26a)

The court of appeals did not stop with definition of the legal duty to disestablish; it scrutinized the record to assure the presence of genuine good-faith, race-neutral policies which afford "real freedom of choice." The court saw two components of the system as bearing most directly on the presence of "true" student choice: institutional mission designation and student admissions policies. The court of appeals found "the record amply supports the findings of the district court that the [institutional mission] designations are commonly used, educationally sound, and not motivated by discriminatory intent." (App. 31a) The court held "the district court gave full consideration to all aspects of the admissions process"; and it concluded district court findings that

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[3] *Bazemore v. Friday*, 478 U.S. 385 (1986).

[4] *Alabama State Teachers Ass'n v. Alabama Public School and College Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

"current admissions policies and procedures in effect in Mississippi universities were adopted and developed in good faith and for nondiscriminatory purposes" were not clearly erroneous. (App. 34a-35a)

The en banc court also found statistical parity in respondents' faculty employment practices, noted the genuineness of the commitment to increase black employment at the predominantly white universities, and acknowledged the substantial difficulties inherent in minority faculty recruitment. (App. 35a-36a) The court of appeals stated it had "nothing to add" to district court findings concerning alleged "disparities between the historically black and historically white institutions regarding program offerings and duplication among universities and branch centers, faculty, funding, library volumes, facilities, and land grant programs," with only one exception. (App. 36a) The court of appeals did find institutional "disparities" today to be "reminiscent" of the segregated system, but only in the sense that present institutional mission designations cannot be totally extricated from an institution's past. The court simultaneously stated that such institutional distinctions do not "deny equal educational opportunity or equal protection of law," for respondents "have adopted good-faith, race-neutral policies and procedures and have fulfilled or *exceeded* their duty to open Mississippi universities to all citizens regardless of race." (App. 37a) (emphasis added). The court of appeals rejected outright the private petitioner suggestion that such institutional differences require resource allocations to universities specifically

according to race to make the predominantly black universities "equal" to the predominantly white comprehensive universities. (App. 37a)

I. The United States' Statement of the Case

The United States asserts that in ruling for respondents "the district court recognized that there remained significant differences between the historically white and historically black schools as to admission standards, student and faculty composition, and funding." (U.S. Pet. at 4) It then purports to contrast these "recognitions" with the district court's finding of satisfaction of the affirmative duty through adoption of race-neutral polices. The implicit suggestion is one of inconsistency. Yet, the district court specifically found with respect to student admission and recruitment that the respondents' current admission policies were adopted for nondiscriminatory purposes and are "inherently reasonable and educationally sound," that respondents "have used every reasonable means at their disposal in their recruitment efforts," and that the continued identifiability of institutions by student racial makeup is the "result of a free and unfettered choice on the part of individual students." (App. 119a-135a, 185a, 187a) The district court likewise not only found statistical parity in faculty employment but also concluded that no "additional minority faculty and staff recruitment procedures" exist which respondents "could implement which would assure greater minority faculty and staff representation at the predominantly white institutions." (App. 135a-138a, 199a) As to

funding, the district court similarly held that "while differences in level of funding obviously exist, these differences are not accountable in terms of race, but rather are explained by legitimate educational distinctions among institutions." (App. 156a-163a, 196a)

II. The Private Petitioners' Statement of the Case

Private petitioners' assertion that the pre-1962 "separate and unequal system is substantially intact" today is erroneous. The single statistic reflecting black participation in the entire public system less than black representation in the population as a whole is meaningless standing alone. The characterization of "HWIs [as] token employers of black faculty" and administrators is flatly contradicted by the substantial evidence of statistical parity in hiring and genuine affirmative recruitment practices. (App. 35a-36a, 135a-138a, 198a-199a) Respondents have always acknowledged that differences in the distribution of programs exist, but the differences or "disparities" are not associated with race at all. They are simply inherent in the difference between comprehensive and noncomprehensive universities. There is no predominantly black comprehensive university, but there also is no pattern among the noncomprehensive universities with respect to race. (App. 11a, 36a, 146a)

Private petitioners' broad allegation regarding alleged less favorable financial treatment of black students than white students obviously does not hold true under their own premise for thousands of students. The

thousands of black students enrolled in the predominantly white comprehensive universities are "treated better" than the thousands of white students at the predominantly white Delta State University and Mississippi University for Women. (App. 196a-197a) Further, the alleged "accumulated deficit" is not among the noncomprehensive universities. There is no present correlation by race among the noncomprehensive universities in funding or with respect to areas in which funds have historically been expended – faculty, facilities, or programs.[5] (App. 29a, 36a, 146a, 161a-166a, 195a-197a)

Private petitioners' contention that the institutional mission designations adversely affect blacks as opposed to whites is incorrect. First, the record establishes blacks themselves are substantial beneficiaries of the educational opportunities nondiscriminatorily afforded by the

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[5] Private petitioners cite the testimony of a Dr. Leslie on funding and institutional mission. Prior to his involvement in this litigation this same Dr. Leslie published the following:

> [Cost] comparisons [of institutions with different missions] are largely without merit. They compare the proverbial 'apples and oranges,' for [such] universities are not similar; they are expected to do quite different things.
>
> The unique character of American higher education is embodied in the concept of diversity. Diversity is the quality that differentiates among colleges and universities. It is the quality of distinctiveness. This quality says that there is no better or best kind of collegiate institution; there are only different kinds, often with different expenses.

(Exh. Bd-459 at 28; Leslie, T. 605-10)

comprehensive universities. (App. 133a-138a, 185a-187a, 196a-199a) Moreover, the 1981 mission designations did not just limit the predominantly black universities. They "put boundaries around all institutions," particularly the predominantly white Delta State University and Mississippi University for Women. (App. 30a-31a) The 1981 mission designations contemplated a "more comprehensive" status for the predominantly black Jackson State University than for the predominantly white Delta State University and Mississippi University for Women. (App. 141a-142a) While the record does address at length issues of institutional prestige and "quality" associated with size and breadth of programs, neither the record nor common knowledge will support the blanket statement that an individual's educational experience at a small school is inherently inferior to that at a large school. Furthermore, there is no demonstrable relationship in this record between resources and racial presence.

Private petitioners' third ultimate factual allegation that the admissions standards are racially discriminatory and impede liquidation of an allegedly discriminatory system is also wrong. Both the district court and court of appeals correctly found that the relevant admission standards actions were taken long after 1961 under totally different circumstances based upon different, reasonable educational criteria and with different, reasonable educational objectives. (App. 32a-35a, 119a-133a, 177a-185a) The record establishes the admission policies are not the cause of the "racial identifiability" of universities. (App. 131a, 184a; Siskin, T. 4228-29) Petitioners' broad assertion of the availability of more inclusionary, alternative admissions criteria ignores their failure to establish the

existence of an educationally reasonable, less "discriminatory" alternative admissions standard.[6] While respondents' practices do not comport precisely with every ACT suggestion, an ACT vice president specifically testified that the educationally reasonable admissions standards are consistent with ACT's encouragement of utilization of criteria in addition to test scores in making admissions decisions. (App. 34a, 132a; Anzalone, T. 3735-36; Exh. US-970 at 124-26, 133-34)

REASONS FOR DENYING THE WRIT

Respondents certainly do not dispute the importance of the subject decision to their citizenry. We have ourselves previously asserted the exceptional importance of proper delineation of the scope of the state's duty to disestablish state-imposed segregation in public higher education. Nevertheless, this is not to say that intervention of this Court is warranted on this record. No intolerable conflict between circuit courts of appeals exists concerning the scope of the legal duty to disestablish. The Fifth Circuit ruling here does delineate a duty different than the one referenced in the Sixth Circuit decision in

[6] Petitioners' testing expert did criticize the use of any "cut score," regardless of how low, but he avoided the fundamental issue of educational reasonableness. He stated this issue would require "a different type discussion" involving "a lot of other things" and declined to address the educational feasibility of any alternative admissions policy. (Hilliard, T. 1918-19, 1923-28)

Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986); but controlling findings in previous pre-*Bazemore* litigation, the narrow issue presented and patent legal rationale errors in *Geier v. Alexander* make resolution of such a "conflict" by this Court unnecessary.

Bazemore v. Friday settles the question of legal duty to disestablish. The United States effectually concedes as much by the single question it presents for review. Stripped of all pretense, the United States raises only the factual question of discriminatory interference with choice, alleged conduct precluded by both *Bazemore* and *Green*.[7] The panel majority opinion is to the same effect; its disavowal of *Bazemore* ultimately purportedly rests only on finding *Bazemore* "factually distinguishable." This Court need not review factual contentions rejected by both the trier of fact and a court of appeals sitting en banc.

Furthermore, application of a broader reading of *Brown*[8] and *Green* than afforded by *Bazemore* will not change the result below. Review by this Court is unnecessary since petitioners are entitled to no relief on this record regardless of whether *Bazemore* is strictly applied or some more "exacting" standard under *Green* is invoked.

I. There is no conflict between circuit courts of appeals which warrants granting certiorari.

The Sixth Circuit's decision in *Geier v. Alexander* is the culmination of a line of decisions concerning desegregation of Tennessee's system of higher education. It deals

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[7] *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

[8] *Brown v. Board of Education*, 347 U.S. 483 (1954).

specifically with the United States' challenge of a single provision of a consent decree to which no other party objected. The district court's approval of the consent decree in 1984 followed 16 years of litigation marked by multiple district court and appellate decisions all preceding this Court's decision in *Bazemore*.

A. *Geier v. University of Tennessee* is factually distinguishable and lacks authority due to this Court's subsequent decision in *Bazemore*.

The United States correctly recognizes that the Sixth Circuit articulated its definition of the scope of the legal duty to disestablish not in *Geier v. Alexander* but in *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979). The factual record materially differs, however, from the controversy here. The Sixth Circuit affirmed as "not clearly erroneous" district court findings of affirmative state actions which actually " 'impeded the dismantling of the dual system.' " 597 F.2d at 1067. The district court here concluded just the opposite (App. 187a, 194a-199a), and the Fifth Circuit affirmed. (App. 26a-37a) Further, the dominant issue in *Geier v. University of Tennessee* was the State's enhancement during the course of the litigation of the University of Tennessee's non-degree-granting center in Nashville; it turned the center into a four-year degree granting branch of the university proximately located to the historically black Tennessee State University. Respondents here long ago mooted allegations of maintenance of predominantly black and predominantly white colleges in the same metropolitan area. (App. 146a-150a) So pervasive were respondents' actions that petitioners declined to even offer purported "off-

campus center" proof after 1981. (Conrad, T. 77-79, 251-52)

Such a different "state of facts" makes granting certiorari unnecessary here. Indeed, the Court has dismissed a writ of certiorari as improvidently granted where "the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law." *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931). Likewise, the "real and embarrassing conflict of opinion and authority between the circuit courts of appeals" generally required before certiorari is granted does not arise under such distinctive facts. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923). This Court's affirmances of both *ASTA* and *Norris*[9] demonstrate with respect to the very issue now before the Court this significance of different factual findings, for the lower courts there also viewed the legal duty to disestablish differently.[10]

Moreover, to the extent *Geier v. University of Tennessee* arguably turns on something other than affirmative state actions impeding desegregation, the linchpin of the court's decision becomes the continued racial identifiability of historically black Tennessee State University.

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[9] *Norris v. State Council of Higher Education for Virginia*, 327 F. Supp. 1368 (E.D. Va.), *aff'd mem.*, 404 U.S. 907 (1971).

[10] The court of appeals here cogently explained the correctness of this Court's affirmances of what the United States described as "contradictory decisions," *ASTA* and *Norris*. (App. 18a)

The Sixth Circuit included the following among its concluding remarks: "Where an open admissions policy *neither produces the required result of desegregation nor promises realistically to do so,* something further is required." 597 F.2d at 1067. The Sixth Circuit, however, did not have the benefit of *Bazemore,* and the Sixth Circuit's attachment of controlling significance to continued racial identifiability flatly contradicts *Bazemore.*

Continued racial identifiability following adoption of an "open admissions" policy where state-imposed segregation once existed in a noncompulsory setting was the precise issue in *Bazemore.* Prior to 1965 the North Carolina Agricultural Extension Service assigned students electing to participate in noncompulsory 4-H or homemaker clubs to particular clubs according to race. Thereafter "in response to the Civil Rights Act of 1964 the Service discontinued its segregated club policy and opened [the clubs] to any otherwise eligible person regardless of race." 478 U.S. at 407. Students electing to participate were permitted to choose the particular club, but "a great many all-white and all-black clubs" remained. This Court's holding based upon these facts could not be clearer: "[T]his case presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy." 478 U.S. at 408.

Directly confronting the constitutional and Title VI inquiry posed by continued racial identifiability, *Bazemore* holds that the state's establishment of a nondiscriminatory admissions system complies with any " 'affirmative action' " requisite "to overcome the *effects of prior discrimination.*" 478 U.S. at 408-09 (emphasis added). Indeed, you

have subsequently stated that *Bazemore* stands for the proposition that continued racial identifiability does not impose a "duty to integrate" in the absence of evidence of "exclusion" by race. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 503 (1989). Justice Scalia, concurring in *City of Richmond*, further observed that in describing *Green* as "a wholly different milieu" *Bazemore* "reflected [your] unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination [, *i.e.*, racial identifiability,] can be equated with state maintenance of a discriminatory system." *Id.* at 525 (Scalia, J., concurring).

Bazemore discredits the decision in *Geier v. University of Tennessee*. There is not the first suggestion in *Bazemore* that in noncompulsory activities like higher education a state must persuade individuals to make choices that lead to systematic integration. Thus, *Geier v. University of Tennessee* has lost its weight of authority by reason of your intervening decision in *Bazemore*, and any conflict between the Sixth Circuit decision and the Fifth Circuit decision here does not necessitate granting certiorari.

B. *Geier v. Alexander* is a consent decree decision controlled by the pre-*Bazemore Geier* litigation.

Admittedly, however, the Sixth Circuit decision in *Geier v. Alexander* is post-*Bazemore* and purports to adhere to *Geier v. University of Tennessee*. The improper confrontation with *Bazemore* notwithstanding, the issue in *Alexander* was not the same as before the Fifth Circuit here. The ultimate issue in *Alexander* was whether the district

court abused its discretion in approving the parties' settlement reached after 16 years of litigation. The narrow *Bazemore*-related question was whether the use in the consent decree of alleged " 'racial quotas' to prefer minority students . . . deprived non-minority students of equal protection." 801 F.2d at 804. Moreover, the Sixth Circuit's treatment of the ultimate issue and narrow *Bazemore* question cannot be divorced from the court's view of the parties' positions throughout the history of the litigation and accompanying prior judicial findings.

The United States, as an intervenor, was the only party objecting to the decree; it limited its objection to a single provision promoting, but not guaranteeing, increased black enrollment in professional schools; and the consent decree "imposed no obligation on the United States." 801 F.2d at 802-03, 806, 810. The Sixth Circuit acknowledged the United States' right as an intervening party to object to the consent decree, but it emphasized that the United States lacked the " 'power to block' " entry by refusing to consent to a decree under which it had no obligations. *Id.* at 808. The court of appeals also observed that the district court "may enter a consent decree that includes broader relief than the court could have ordered after a trial." *Id.* When confronted with the prospect of concluding the litigation by consent, the court chose to describe the Department of Justice's present attempt to "pull back" from the broad remedial orders it had previously pursued throughout the litigation as "a truly ironic situation." *Id.* at 809. The Sixth Circuit's reluctance to invoke *Bazemore*, which was decided only two weeks before oral argument in *Alexander*, is at least somewhat understandable under such circumstances.

Furthermore, the court of appeals thought it significant that "virtually the entire argument by the Department of Justice in the district court was built upon the theory of 'victim specificity,' " a position abandoned at oral argument. Of still greater significance was the Sixth Circuit's view that the United States' change in position was not merely the previously referenced "truly ironic situation"; the court treated the United States' contentions as virtually barred by previous holdings in the case. It emphasized the application of *Green* to higher education desegregation was "established as the law of the case" in 1968 without the United States "arguing to the contrary before the district court." 801 F.2d at 805. The court likewise insisted that the Department of Justice's 1986 position that "the illegal condition of segregation . . . was cured by adoption of an open-admissions policy and compliance with the district court's prior decrees" was "contrary to specific findings of the district court in decisions that became *final without appeal.*" *Id.* (emphasis added).

That the Sixth Circuit in *Alexander* expressly declined to apply *Bazemore* obviously cannot be denied. The point here, however, is that the context in which the Sixth Circuit failed to apply *Bazemore* does not create an intolerable conflict as to a rule of law sufficient to mandate granting certiorari. The determinative issue in *Alexander* is not what actions a state *must* take to disestablish state-imposed segregation. The ultimate holding is only that "the district court did not abuse its discretion in entering the consent decree without the approval of one intervening party." 801 F.2d at 810. To be sure, the Sixth Circuit

reaches this result by affording *Bazemore* a reading different than the Fifth Circuit here. Nonetheless, and particularly given *Alexander's* unique procedural posture, the Sixth Circuit's refusal to conclude *Bazemore* condemned the modest attempt to promote professional school enrollment of qualified blacks actually poses no conflict in application of a rule of law. The Fifth Circuit's holding here embraces too the encouragement of greater black participation at predominantly white universities.[11]

The disagreement in reasoning between the two courts of appeals concerning the applicability of *Bazemore* to different questions also does not constitute a conflict in "principle" sufficient to justify granting certiorari.[12] This

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[11] The record demonstrates and the district court approved respondents' substantial affirmative efforts to increase black presence at the predominantly white universities. (App. 201a) For example, such affirmative actions include special salary support for minority faculty (Lucas, T. 3425-26; Feisal, T. 3947; Exh. US-946 at 115), preferential treatment for minorities in faculty housing (Chain, T. 4130-31; Exh. Bd-104 at 25), scholarships and stipends earmarked for minority use (Feisal, T. 3947; Exh. US-964 at 35-36, US-967 at 54; Exh. Bd-041 at 18, Bd-104 at 26-27), and cooperative engineering, law and health professions programs targeting qualified black students. (Exh. Bd-103 at 5, 6 & 15, Bd-109 at 5-6; Exh. US-749, US-755) The Fifth Circuit found that respondents had met or *exceeded* their duty to disestablish. (App. 37a)

[12] The court of appeals here did also state it disagreed with the "holding" in *Alexander*. (App. 22a) The Fifth Circuit did not appear to consider the distinct proposition of whether *Bazemore*, or the Fourteenth Amendment, precluded entry of the single consent decree provision; the court clearly did not explore this Court's body of affirmative action jurisprudence

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is particularly true since the Sixth Circuit panel's rationale is so clearly wrong and has been soundly rejected by the Fifth Circuit en banc, including the judges in dissent. The en banc court properly concluded: "The root problem with the *Geier* court's reasoning was correctly identified by the panel majority in the present case as an improper 'hierarchy of values.' . . . Such a hierarchy is purely subjective, impossible to apply, and not founded on the Constitution." (App. 23a) *Bazemore* makes no constitutional differentiation according to perceived value of the state-sponsored activity and no other Supreme Court decision suggests such a sliding scale; discrimination in *any* state activity is equally unlawful.

II. This Court has adequately settled the duty of the state on this record to disestablish de jure segregation in higher education.

A. *Bazemore*, particularly when read in conjunction with *ASTA*, clearly defines the duty to disestablish in higher education.

Bazemore's failure to address higher education specifically does not preclude recognition that it adequately settles the issues raised by the petitions. (Priv. Pet'r Pet. at 24-25) Indeed, the United States concedes for all practical purposes the applicability of *Bazemore* to definition of the state's duty to disestablish de jure segregation in higher education. It carefully avoids any assertion that

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concerning the appropriateness of governmental racial classifications and race-conscious remedies. In any event the holding in *Alexander* is not the question presently before this Court.

the "discontinuation of prior discriminatory practices and adoption of a wholly neutral admissions policy" fails to satisfy the legal duty to disestablish. Instead, the United States subtly frames the issue in the context of alleged continued state interference with choice by race, a disguised factual question which if established would violate the *Bazemore* legal standard. Private petitioners do challenge directly the legal sufficiency of adoption of genuine race-neutral policies, but their various attempts to escape *Bazemore* only demonstrate why *Bazemore* is determinative here. The panel majority itself concluded only that *Bazemore* was "factually distinguishable," a finding the panel dissenter and author of the en banc majority opinion correctly observed "merely puts the evidence ahead of the standard." (App. 73a, 103a)

The lines were clearly drawn in *Bazemore*. Both the majority opinion and dissent plainly depict the issue to be delineation of the state's obligation to disestablish de jure segregation in voluntary, noncompulsory associations. Private petitioners assert *Bazemore* "does not purport to adopt a rule applicable to all instances in which persons choose to participate in a particular entity." Yet, the Court specifically states your "cases requiring parks and the like to be desegregated lend no support for requiring more than what has been done in this case." 478 U.S. at 408. Indeed, in a park desegregation decision, the Court specifically grouped parks with state universities, distinguishing them from elementary and secondary schools. *Watson v. City of Memphis*, 373 U.S. 526, 532 n.4 (1963).

Bazemore cannot be skirted on grounds of "different subject matter." The entire en banc court agreed that the

refusal in *Bazemore* to apply *Green* rests upon "choice." *Bazemore* described *Green* as a "wholly different milieu" because the state mandated and controlled attendance patterns typical of compulsory elementary and secondary schools presented an altogether different issue than the noncompulsory clubs (and higher education). *Bazemore*, 478 U.S. at 408, 416 n.4 (adoption of U.S. position); *City of Richmond*, 488 U.S. at 525 (Scalia, J., concurring). Further, no duty to exhaust "possibilities" or efforts to induce desegregative choices can be gleaned from *Bazemore*.[13] The court of appeals clearly properly harmonized *Bazemore*, *Norris*, *ASTA*, and *Green*.

B. Even application of a broader reading of *Brown* and *Green* than afforded by *Bazemore* will not change the result below.

The district court's analysis of the evidence went far beyond the mere confirmation of respondents' adherence to the *Bazemore* standard through discontinuation of prior discriminatory admission practices and the adoption of a "wholly neutral admissions policy." It made extensive factual findings addressing motive, effect, and the availability of educationally reasonable alternatives concerning not just student admissions and recruitment and faculty and staff employment efforts but also resource allocation practices. The district court's exhaustive

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[13] The petitioners' own suggestion that "services" or resources had been equalized in *Bazemore* belies the contention that other-race participation must be encouraged. Making 4-H clubs "the same" would obviously not encourage club selection on some basis other than race.

review of the evidence demonstrates that respondents have fulfilled any more "exacting" duty to disestablish arguably applicable under *Brown* and *Green*.

The court of appeals found respondents "have fulfilled or *exceeded* their duty to open Mississippi universities to all citizens regardless of race." (App. 37a) (emphasis added). With respect to student admissions policies the court stated it "would be reluctant to say the [respondents] have not met their duty even under *Green*." (App. 34a) In response to private petitioners' erroneous Title VI regulations contentions, the appellate court stated: "Under the present record we are not prepared to say the [respondents] have failed to meet the [alleged broader] duties outlined in the regulations." (App. 26a n.11)

Such conclusions easily rest upon findings of (i) respondents' exhaustion of reasonable efforts in other-race student, faculty and staff recruitment (App. 35a-36a, 133a-138a, 166a-168a, 185a-187a, 198a-199a); (ii) respondents' implementation of "extremely flexible," "very modest," "nondiscriminatory," "educationally reasonable" admission standards (App. 6a-9a, 34a, 119a-133a, 181a-185a); (iii) admissions practices which are not the cause of institutional racial identifiability and which in reality deny "only a few black first-time applicants" enrollment at the comprehensive universities (App. 34a, 131a, 184a); (iv) the absence of racial correlation in program distribution, facilities placement, funding allocation and institutional mission assignment (App. 29a-31a, 36a, 146a, 161a-166a, 192a-197a); and (v) continued racial identifiability resulting from free student choice. (App. 2a, 27a, 187a, 201a) Such findings portray the elimination

of "racial discrimination through official action." The "root and branch" elimination of the "vestiges" or "lingering effects" of a dual higher education system can mean nothing more.[14]

Thus, this Court need not undertake to delineate further the applicable duty to disestablish state-imposed segregation when it will not change the result below. The ultimate controversy here is factual, not legal. Both the

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[14] The United States alleges a failure to disestablish in two particular respects – student admissions and program duplication. Addressing admissions at length both lower courts readily concluded the record will not support any allegation of "racial bias." Likewise, private petitioners' Title VI claims present no novel issues. *Bazemore* clearly controls any issue under the "affirmative action" regulation cited by private petitioners (but not the United States); 34 C.F.R. § 100.3(b)(6)(i) is identical to 7 C.F.R. § 15.3(b)(6)(i), upon which the *Bazemore* plaintiffs unsuccessfully relied. *Bazemore*, 478 U.S. at 412 (Brennan, J., dissenting). Further, the trial court found respondents' practices to have substantial legitimate educational justification, and the petitioners failed to disprove that justification. *See Quarles v. Oxford Municipal Separate School District*, 868 F.2d 750, 754 n.3 (5th Cir. 1989).

The assertion that program duplication perpetuates the dual system is equally meritless. The district court correctly found that "there is no proof that unnecessary program duplication is directly associated with the racial identifiability of institutions"; that "there is no proof that the elimination of unnecessary program duplication would be justifiable from an educational standpoint or that its elimination would have a substantial effect on student choice"; and that "there is no showing in this case that the elimination of unnecessary programs within the system of higher education in Mississippi would be feasible, educationally reasonable, or would offer any hope of substantial impact on student choice." (App. 194a) The court of appeals agreed. (App. 36a)

district court and court of appeals have expended enormous energy in assessment of the voluminous record. This Court as a court of law need not undertake that task again, particularly when both lower courts unequivocally found that the record clearly required the same result.[15]

CONCLUSION

The general requisites for granting certiorari are not compelling here; the en banc lower court decision is plainly correct. The petitions should be denied.

Respectfully submitted,

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[15] The questions presented by private petitioners in addition to the scope of the legal duty to disestablish obviously do not warrant discretionary review by this Court. The court of appeals' disposition of these issues is beyond credible challenge.